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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-5227

Supreme Court, U.S.
FILED
AUG 9 1983
Alexander L. Stevas, Clerk

JOHN HARVEY ADAMSON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No._____

JOHN HARVEY ADAMSON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

QUESTION PRESENTED

Whether the Arizona Supreme Court erred when it decided that the introduction of evidence at trial clearly in violation of the Petitioner's right to confront and cross-examine a witness as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was nevertheless harmless error, applying an incorrect test for harmless error, when the record discloses that the jury considered the inadmissible evidence critical which evidence contributed to the guilty verdict.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

Petitioner, JOHN HARVEY ADAMSON, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona entered April 11, 1983, Motion for Rehearing being denied on June 22, 1983, affirming his conviction and sentence of death.

CITATION TO OPINION BELOW

A copy of the written opinion of the Arizona Supreme Court is attached hereto and appears in the appendix.

JURISDICTION

On April 11, 1983, the Supreme Court of Arizona affirmed the petitioner's conviction and death sentence. On June 22, 1983, that court denied a timely motion for rehearing as set out in the order appearing in the appendix. This Petition is being filed within 60 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of a right secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the Arizona Supreme Court erred when it decided that the introduction of evidence at trial clearly in violation of the Petitioner's right to confront and cross-examine a witness as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was nevertheless harmless error, applying an incorrect test for harmless error, when the record discloses that the jury considered the inadmissible evidence critical which evidence contributed to the guilty verdict.

CONSTITUTIONAL PROVISIONS AND PRINCIPLES INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution as well as the doctrine of Harmlessness of Federal Constitutional Error.

STATEMENT OF THE CASE

This Petition seeks review of the decision of the Supreme Court of Arizona affirming John Harvey Adamson's conviction for the murder of Arizona Republic Newspaper reporter, Don Bolles, and his subsequent death sentence. Petitioner's timely Motion for Rehearing was denied by order on June 22, 1983.

Petitioner was tried by a jury sitting in Pima County, Arizona, after a change of place of trial for massive pretrial publicity from Maricopa County, Arizona, commencing on October 7, 1980. Jury voir dire had taken one month. After a week of testimony and a day and a half of jury deliberations Petitioner was found guilty of murder.

At trial and before,the Petitioner had moved that certain extra-judicial statements made by the victim be excluded from

evidence for the reasons that they were unreliable hearsay statements made by the victim pertaining to matters of which he had no personal knowledge and were prejudicial. The trial court denied the motion.

One witness was permitted to testify that "the first thing Don Bolles said [at the scene of the bombing] was Adamson did it. . . . He again said Adamson did it. . . . he had said he was investigating a Mafia called Emprise. . . ." A fireman at the scene was permitted to testify that "I overheard him say he was an investigative reporter and that he wanted everybody to know that the Mafia was responsible, and that apparently they had made good on their threats". An officer who interviewed Bolles at the hospital afterwards and before his death testified that "I asked [Bolles] if he suspected the Emprise Corporation for the bombing and he said he did".

Bolles was mortally wounded by an explosive device which was attached to the underside of his car and detonated by a remote control device as Bolles was pulling out of a parking space at a midtown Phoenix, Arizona hotel. While laying on the pavement in the parking lot and then later in the hospital, he made the statementsmentioned above. He died eleven days after the bombing having had both legs and one arm amputated.

In addition to the statements of Bolles, Robert Lettiere testified that he had gone to the Arizona Republic Newspaper parking lot with Adamson and had heard him ask the guard where "Don so-and-so's car was". Lettiere also testified that, in essence, Adamson admitted to him that he was going to blow somebody up. Lettiere said he accompanied Adamson to a car lot where

Adamson inspected the undercarriage of a car. Lettiere said that he met Adamson later after the bombing where Adamson aknowledged responsibility for the bombing.

Evidence was introduced that Adamson purchased parts which could have been used in a device to trigger the bomb from a hobby shop in San Diego, California. Also, a battery, tape and magnets similar to that which was used to construct the bomb were found in Adamson's apartment.

Adamson did not testify at trial but called a number of witnesses to establish his alibi defense and the fact that his chief accuser, Robert Lettiere, may have been responsible for the attack. Thomas O'Grady testified that he was with Adamson during roughly the period of time that the bombing took place. The guard at the newspaper parking lot was called as a witness and testified that it was someone other than Adamson who came to the lot asking about Bolles. His description of the person matched the general description of Lettiere.

Lettiere, when testifying, admitted to being a convicted felon and that he had applied for the monetary reward being offered by the Arizona Republic for information concerning the perpetrators of the crime.

The jury deliberated for a day and a half before returning a verdict of guilty. On the day set for sentencing, November 14, 1980, counsel for the Petitioner had subpoenaed the foreman of the jury as a result of a newspaper article which appeared in the newspapers before sentencing. Simply put, the article quoted the foreman as saying the jury was split 8 to 4 for conviction

for most of the deliberations until the foreman discussed with the rest of his fellow jurors the statements attributed to Bolles. The article appears in the appendix.

The Petitioner desired to call the jury foreman to testify concerning what he had supposedly told the newspapers. It was the Petitioner's position that in the event an appellate court found the trial court's ruling admitting Bolles's statements to be in error it would be hard-pressed to find that such error was harmless. The trial court precluded the juror from being called as witness but allowed the newspaper article to be marked and made a part of the record for appellate review.

The Arizona Supreme Court affirmed the conviction and death sentence. Justice Feldman dissented arguing that though the majority found the trial court to be in error in admitting Bolles' extrajudicial statements his colleagues erred in finding that the fundamental error was harmless because the evidence was overwhelming as to the guilt of the Petitioner. Justice Feldman pointed out that the majority had applied the incorrect standard for determining harmless error. The majority either overlooked or was unaware of the record made by the Petitioner at sentencing pertaining to the jury deliberations. In commenting on the "overwhelming evidence" in connection with another issue argued on appeal the court mentioned in its opinion that the trial had been a five-week trial and deferred to the trial judge as one who was better able to weigh the effect of prejudicial information which came to the attention of the jury. As noted above, though the jury selection process took one month to complete,the evidentiary phase was completed in one week.

REASONS FOR GRANTING THE WRIT

The Arizona Supreme Court clearly found that admitting the objectionable statements made by Bolles was error. It found that information imparted by Bolles was not within his personal knowledge since they were "mere suspicions". Because the statements were not based on events perceived by Bolles through one of his senses they were inadmissible. It goes on to say that the error does not require reversal because "it can be said beyond a reasonable doubt that it [the error] had no influence on the verdict of the jury". The majority framed the dispositive question as being "whether, without this evidence, the appellate court can say, beyond a reasonable doubt, the jury would have found the defendant [Petitioner] guilty". Nowhere does the court mention or in any way discuss or explain away the Petitioner's position that the statements of Bolles were crucial to his conviction as evidenced by the newspaper article.

As pointed out in Justice Feldman's dissent "the effect of the statements by Bolles was to inform the jury that Bolles had identified the defendant [Petitioner] as the perpetrator of this crime and that a Mafia controlled corporation, which wanted to stop Bolles' investigation, had ordered the bombing. The victim, speaking from the grave, was thus allowed to name the criminal and explain the motive".

The majority has concluded that if they were jurors they would have found the Petitioner guilty even without the erroneously admitted evidence. Therefore the error was harmless. By using the wrong test in deciding what error is harmless error

it has graphically displayed why our criminal justice system provides for a jury uninfluenced by constitutional error as the body entrusted with the responsibility of determining guilt or innocence and that harmless error occurs when there is no reasonable possibility that the evidence complained of might have contributed to the conviction, which is albeit, a much different standard than that used by the Arizona Supreme Court here. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed2d. 705 (1967).

This prosecution of the Petitioner was the most publicized in the history of the state. As mentioned at the outset, a change of place of trial was necessary to insure the Petitioner's right to a fair and unbiased jury. Because the Petitioner admitted in a prior plea bargain arrangement later declared null and void that he was indeed guilty, which said admission was made public repeatedly, it took a great deal of time to select a jury unaware of the publicity which could render a fair and impartial decision. For the majority to say that on the record they would have found the Petitioner guilty even absent the inadmissable evidence is irrelevant and merely points out why, in a case such as this, the standard for determining harmless error as employed by the majority is clearly inappropriate. Knowing what the majority knew about this case, i.e. the earlier plea bargain by the Petitioner and his resultant admissions of guilt, renders its explanation for finding the error harmless sheer folly.

Because it is so important, and even though cited in Justice Feldman's dissent attached hereto, this Court's explanation of harmless error in Chapman, supra,bears repeating:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so important and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
>
> In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad so far as possible.
>
> . . . We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d. 171. There we said: "The question is whether there is a reasonable possiblity that the evidence complained of might have contributed to the conviction." At 86-87, 84 S.Ct. at 230.

Thus, came the "contribution to the verdict" test for determining harmless error. And as noted by Justice Feldman, this Court's subsequent decision in Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d. 284 (1969), applied the same standard even though it talked also of overwhelming evidence.

Of course, as in most cases involving practically any issue, a case's own unique set of facts is important in disposing of a question. In Harrington, supra, "overwhelming evidence" was discussed in light of the fact that there was other evidence clearly appropriate which established, in essence, the same thing as the inadmissible evidence. The improperly admitted evidence was merely cumulative in light of properly admitted, direct and untainted evidence. In the case at bar, most of the State's case against the Petitioner was merely circumstantial.

At the risk of being repetitive, the record is clear that the evidence was not overwhelming as declared by the Arizona Supreme Court , and that most definitely, the improper evidence admitted by the trial court contributed to the guilty verdict. Again as mentioned by Justice Feldman, the dangers of utilizing an overwhelming evidence test without regard to the effect of tainted evidence on the jury were discussed by this court in its recent decision in Connecticut v. Johnson, 51 U.S.L.W. 4175 (U.S. Feb. 23, 1983) (No. 81-927). As this Court observed in that decision, to allow the appellate court in this case to, in reality, perform the jury's function, really ignores the reasons for the presence of the jury in the criminal justice scheme.

The Arizona Supreme Court was in error in determining that the introduction of the inadmissible hearsay statements of the victim, Bolles, was harmless Federal Constitutional error. Certiorari should be granted here to correct it.

CONCLUSION

The writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 9th day of August, 1983.

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ATTORNEY FOR PETITIONER

RECEIVED
AUG 11 1983
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-5027

Supreme Court, U.S.
FILED
AUG 9 1983
Alexander L. Stevas, Clerk

JOHN HARVEY ADAMSON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, JOHN HARVEY ADAMSON, pursuant to U.S. Sup Ct. Rule 46, 28 U.S.C.A. and Title 18 U.S.C., § 3006A (d)(6), respectfully moves this Honorable Court for leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of Arizona without prepayment of costs and to proceed in forma pauperis. Counsel undersigned has been appointed to represent the Petitioner before the Arizona trial courts, appellate courts, and the United States District Court for the District of Arizona, the United States Court of Appeals for the Ninth Circuit, and this Court.

This motion is based on the attached affidavit of the Petitioner who is presently incarcerated in the Arizona State Prison, Florence, Arizona.

RESPECTFULLY SUBMITTED this 9th day of August, 1983.

MARTIN & FELDHACKER

By _____
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P.O. Box 5142
Scottsdale, AZ 85261
(602) 948-0353

ATTORNEY FOR PETITIONER

RECEIVED
AUG 1 1983
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-5037

Supreme Court, U.S.
FILED
AUG 9 1983
Alexander L. Stevas, Clerk

JOHN HARVEY ADAMSON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF ARIZONA)
) ss:
County of MARICOPA)

I, JOHN HARVEY ADAMSON, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state because of my poverty I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to redress; and that the issue which I desire to present on appeal is the following:

The Arizona Supreme Court erred in finding that the denial of Petitioner's right to confront his accuser was harmless error in light of the record which clearly demonstrated that the jury considered the hearsay statements of the victim

to be critical in their deliberative process.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   Answer: N/c

   If the answer is no, srate the date of your last employment and the amount of the salary and wages per month which you received.

   Answer: 1992 (approx) $10.00 @ mo

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   Answer: No

3. Do you own any cash or checking or savings account?

   Answer: No

   If the answer is yes, state the amount.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Answer: No

   If the answer is yes, describe the property and state its approximate value.

   Answer:

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Answer: None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John Harvey Adamson

SUBSCRIBED AND SWORN TO before me this 27th day of July, 1983.

Notary Public

My Commission Expires:

August 4 1985

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

FILED
APR 11 1983
CLERK SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

JOHN HARVEY ADAMSON,

Appellant.

No. 5155

Appeal from the Superior Court of Maricopa County

(Cause No. CR-93385)

The Honorable Ben C. Birdsall, Judge

Affirmed

Robert K. Corbin — Phoenix
Attorney General

William J. Schafer III — Phoenix
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Criminal Division

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By: William H. Feldhacker
and
Gregory H. Martin

Attorneys for Appellant

Several rescuers administered first aid to the victim who was still conscious although critically injured. Both of his legs and one arm were severely mutilated. Bolles made statements to the rescuers which implicated the defendant and asked one witness to call his wife. He mentioned the defendant's name several times and stated that "Adamson [set or sent] me." He also told the individuals rendering first aid, "You better hurry up, boys. I feel like I'm going."

The next day the victim responded to questions from the Phoenix Police by means of finger and hand signals. Bolles indicated that he had gone to the hotel the day before to meet Adamson and had received a call from him while waiting for his arrival. Bolles identified a driver's license photograph of the defendant and indicated that he was the man Bolles had met four days earlier while investigating the same story. After having both legs and one arm amputated, Bolles died June 13, 1976.

Intensive police investigations in the days immediately following the bombing revealed the structure of the bomb and that it was a radio-controlled device. The police also established that the defendant was involved in the incident and a warrant was issued to search his apartment. In searching Adamson's residence the police found materials similar to those used to construct the bomb which was attached by magnets to the underside of Bolles' automobile. Literature which contained information concerning the making of explosive devices was also seized. Further investigations revealed that Adamson had purchased remote control equipment two months earlier

that defendant now appeals. Further facts will be set out as necessary in the discussion of the issues raised on appeal.

The defendant's Petition for Review of the denial of his Rule 32 petition was consolidated with this appeal pursuant to Ariz. R. Crim. P. 31.4(b)(2).

Statements and Notes of Victim

A. Hospital Statements

The day after the bombing three detectives went to the hospital to question Bolles about the bombing. In response to their questions Bolles indicated that he had gone to the hotel to meet the defendant and that while at the hotel he received a call from Adamson. Bolles also identified a photograph of Adamson and indicated that the defendant was the person he had intended to meet on the morning of June 2nd. Appellant contends that the trial court erred in denying his motion to suppress the hospital statements on the grounds that they were inadmissible hearsay.

At the outset we set forth the standard for review: A trial court's denial of a motion to suppress will not be reversed in the absence of a clear abuse of discretion. State v. Ferreira, 128 Ariz. 530, 627 P.2d 681 (1981). The trial court ruled that the statements were admissible as dying declarations under Ariz. R. Evid. 804(B)(2). That rule requires the following: (1) that the statements in this case are being used in a homicide prosecution; (2) the statements were made by a declarant while believing his death was imminent; and (3) that the statement concerned the cause or circumstances of what he believed to be his impending

indicated that in some manner the defendant was involved in the bombing. The victim further stated that a mafia-related organization could have played a role in the bombing. The trial court denied the defendant's motion to suppress these statements allowing them to come in as evidence by applying both the excited utterance and dying declaration exceptions to the hearsay rule. On appeal appellant contends that the statements should not have been admitted at trial since they were not based on the personal knowledge of the victim.

A trial court's ruling on whether a particular statement was in fact an excited utterance will not be reversed absent a clear abuse of discretion. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976); State v. Kevil, 111 Ariz. 240, 527 P.2d 285 (1974). An excited utterance is: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ariz. R. Evid. 803(2). In the instant case there is no question that an exciting event had occurred and that the statements in question occurred immediately thereafter. The victim's statements related to the bombing since they were made for the precise reason of revealing who was responsible for the bombing and setting up Bolles. See State v. Kevil, supra. Furthermore, there is no question that the victim's statements were dying declarations. Ariz. R. Evid. 804 (b)(2). Bolles expressly stated that he felt like he was going and the statements concerned the cause and circumstances of what he believed to be his impending death.

jury. State v. McVay, 127 Ariz. 450, 622 P.2d 9 (1980). "The question is whether, without this evidence, the appellate court can say, beyond a reasonable doubt, that the jury would have found the defendant guilty." Id. at 453, 622 P.2d at 12. In this case we believe that this question can be answered affirmatively.

Robert Lettiere testified that he went to the Arizona Republic parking lot with Adamson and overheard him ask the guard where "Don so-and-so's car was." Adamson told Lettiere that he "was looking for a certain white car." (Bolles' car was white.) He also told Lettiere that he was going to blow a car up because this guy was stepping on people's toes and that he was being paid $10,000 for the job. After leaving the Arizona Republic parking lot the defendant and Lettiere went to a Datsun dealership where Adamson examined the underside of several cars similar to that owned by Bolles. The day after the bombing Adamson and his wife visited Lettiere where the defendant told Lettiere "You didn't believe I could do something like that * * * and you got to believe it now." Adamson also said that if he ever bought a car himself he "would have to get a Datsun because it sure as hell took a jolt." He also said "He could be in the same boat that Don Bolles was in because he had botched the job." Evidence was introduced which established

pad and read:

"John Adamson
lobby at 11:15
Clarendon House
4th & Clarendon"

The other typewritten note had been placed in the typewriter of Bernie Wynn, the victim's supervisor, and read:

"Bernie:

"I've gone to meet that guy with the info on Steiger at the Clarendon House. Then to Sigma Delta Chi. Back about 1:30 p.m.

Bolles"

At the trial the state called Wynn who testified as to the circumstances under which he found both notes. He also testified that it was Bolles' habit to leave notes such as the typewritten note which indicated when he would return to the office.

The defendant has not shown this Court that the trial court clearly abused its discretion in denying the motion to suppress these notes. State v. Ferreira, supra. Rule 901(b)(2) Ariz. R. Evid. allows the proponent of a written note to establish its authenticity through the use of nonexpert opinion as to the genuineness of handwriting based on familiarity with that handwriting. At the motion to suppress hearing and the trial Wynn testified that he had worked with Bolles for fourteen years, was familiar with his handwriting, and that the handwritten note was in fact in the victim's handwriting. Thus, under Rule 901 authorship of the handwritten note was properly shown.

to show Bolles' intent to meet the defendant at the scene of the bombing. While this may be true, Arizona follows the state of mind exception to the hearsay rule which is applicable to the victim's notes. State v. Ramirez, 116 Ariz. 259, 569 P.2d 201 (1977); Ariz. R. Evid. 803(3).

A statement offered to show the state of mind of a declarant/victim may be admissible under the state of mind exception to the hearsay rule as long as the declarant/victim's state of mind is relevant to an issue involved in the criminal proceeding. State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981); State v. Ramirez, supra; State v. Lehman, 126 Ariz. 388, 616 P.2d 63 (App. 1980). The notes were relevant in this case since they were used to show that the victim intended to meet Adamson at the hotel. Establishing the defendant's presence at the hotel near the time of the bombing was a critical factor in the state's case. We therefore find that the trial court was correct in finding that the notes could be properly authenticated, the contents were relevant, and that they were admissible under Rule 803(3).

Search of Defendant's Apartment

A. Probable cause

Defendant contends that the warrant to search his apartment was invalid because the affidavit for the warrant omits detailed references to persons or other sources as the underlying circumstances for the affiant's belief in some of the facts he stated in the affidavit. As a result, defendant contends that the trial court

said "And there's my daddy's tools." Finally, the affidavit includes the information gained from Bolles at the hospital the day after the bombing regarding his plans to meet the defendant the day of the bombing.

We have consistently held that affidavits for search warrants should be interpreted in a common sense and realistic fashion. State ex rel. Collins v. Superior Court, 129 Ariz. 156, 629 P.2d 992 (1981); State v. Torrez, 112 Ariz. 525, 544 P.2d 207 (1975), cert. denied, 425 U.S. 916 (1976). If a magistrate has probable cause to issue a search warrant, that warrant should not be invalidated by hypertechnical interpretation. State ex rel. Collins v. Superior Court, supra; In re One 1970 Ford Van, I.D. No. 14GHJ55174, L.No. CB 4030, 111 Ariz. 522, 533 P.2d 1157 (1975). Defendant objects to the use of his son's statements by claiming that statements of young children are presumed to be unreliable for trial use. Evidence supporting a finding of probable cause need not meet the standard for admissibility at trial. Spinelli v. United States, supra; State v. Berge, 130 Ariz. 135, 634 P.2d 947 (1981); cf. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (affidavit for search warrant may be based on hearsay information). Thus, even if it were true that Adamson's son was not competent to testify at trial, we believe that the statements made while pointing at the pictures were properly considered together with other information when deciding if probable cause had been established.

items since he claims they were seized without probable cause: 1 - small spool uninsulated wire, 1 - small spool insulated wire, 1 - 6 volt Eveready battery, 1 - 3/4" black plastic electrical tape partially used, 1 - 9 volt Eveready transistor battery, 1 - "Anarchist Cookbook" by William Powell, and 2 - homemade green 2 3/8 inch x 1 inch blasting fuse firecrackers. We have already determined that the affidavit in support of the warrant adequately established probable cause for search of the items listed therein. Thus, all of the items listed on the warrant and found in Adamson's apartment were properly seized. We also believe that the searching officers properly seized the materials not listed on the warrant since those items were reasonably related to the crime. State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982); State v. Seigliano, 120 Ariz. 6, 583 P.2d 893 (1978); A.R.S. § 13-3916(C). It was later shown that batteries were integral to the operation of the explosive device and it is reasonable to believe that literature related to the construction of such a device would be found along with the materials used. We hold that the items defendant objects to were properly seized.

C. Nighttime Search

Defendant next raises the argument that there was not "good cause" for service of the search warrant at night.[2/] Adamson

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2/ A.R.S. § 13-1447 (in effect at the time the warrant was issued and now codified at A.R.S. § 13-3917) provides: "Upon a showing of good cause therefor, the magistrate may, in his discretion insert a direction in the warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant

16, 121 Cal. Rptr. 269 (1975). In the instant case an egregious crime had been committed. The police had been carrying on intensive investigations since the bombing occurred. Attempts at serving the warrant began before ten p.m. The police had spent most of June 5, 1976 drafting the affidavit in support of the warrant and upon its completion immediately went to the home of Maricopa County Superior Court Judge Rufus Coulter to have it reviewed, sworn to, and signed. The police then went directly to Adamson's home and began the search. Under these circumstances we believe that there was no abuse of discretion in issuing the nighttime warrant since it was supported by "good cause" and therefore proper under A.R.S. § 13-1447.

The Anarchist Cookbook

Adamson argues that it was error for the trial court to admit any portion of "The Anarchist Cookbook" by William Powell because it had no relevancy to the issues to be resolved in the case. The trial judge granted part of Adamson's motion in limine and allowed in as evidence only Chapter 4 entitled "Explosives and Booby Traps" together with the cover sheets of the book.

Rule 402 Ariz. R. Evid. states that all relevant evidence is admissible. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 Ariz. R. Evid. The trial court is allowed reasonable discretion in determining relevance and admissibility of offered evidence, and

with dynamite fuse in them had been found. Up until this point, however, it had been the assumption of the defense, state, and trial court that the police had discovered a separate coil of dynamite fuse. In fact, defense counsel elicited testimony from Sergeant Aurelius regarding the dynamite fuse found in Adamson's apartment. The day after Sergeant Aurelius testified about the dynamite fuse, the defense made a motion for mistrial which was denied. In his denial the trial judge stated that if error had been made regarding the fuse, then evidence could still be brought before the jury to clear up the error.

The decision to grant a mistrial is left to the sound discretion of the trial court. In the absence of any showing of abuse of discretion the ruling of the trial court will not be reversed on appeal. State v. Trotter, 110 Ariz. 61, 514 P.2d 1249 (1973). We do not believe that the trial court abused its discretion in denying defendant's motion for mistrial. In his own case the defendant called Sergeant Aurelius to explain any misimpression which had been left with the jury. Sergeant Aurelius testified as follows:

> "Q. Sgt. Aurelius, do you recall testifying in this trial a few days ago?
>
> "A. I do.
>
> "Q. Do you recall testifying that you found dynamite cord at John Adamson's home on the execution of the search warrant?
>
> "A. I do.

the defendant contends, the evidence was irrelevant under Rule 401 Ariz. R. Evid.

As stated before, "relevant evidence" means evidence having a "tendency" to make the existence of a fact of consequence more or less probable. Rule 401 Ariz. R. Evid. Evidence is relevant if it has any basis in reason to prove a material fact in issue or if it tends to cast light on the crime charged. State v. Moss, 119 Ariz. 4, 579 P.2d 42 (1978). In determining relevancy and admissibility of evidence the trial judge has considerable discretion. State v. Starks, 122 Ariz. 531, 596 P.2d 366 (1979). We believe that the trial court properly found the magnets, tape and battery relevant. All of those items tended to establish that the defendant had the materials and means available to him for construction of an explosive device. The items found in Adamson's apartment were substantially similar to the parts that were found by investigators to have been used to construct the bomb. The availability of materials which could be used to make a bomb, plus the fact that a bomb was made with similar materials, increases the "tendency" that the defendant was responsible for the bombing of the victim. While we find that the trial judge properly admitted the magnets, tape and battery, we note that the weight given to this evidence in the determination of this matter was within the discretion of the jury. 1 Wigmore on Evidence § 29 (1940). We find no error.

"Q. When did you hear that?

"A. I think it was either the next day or two days later at the most.

"Q. How did you hear that?

"A. As I recall, Mr. Adamson was arrested for defrauding an innkeeper.

"Q. Did you hear that they were looking for Mr. Adamson?

"A. Something to that effect. There was a lot of conversation in all them bars at that particular time of this incident.

"Q. Is that how you heard it?

"A. Yes, sir.

"Q. And then you reconstructed from that point back?

"A. Just -- just as well as we could. And from what we could remember, we figured if what the newspaper said was true we were with Johnny right around that particular time of day." (Reporter's Transcript, October 13, 1980, pp. 119-21).

The prosecutor was attempting to establish how O'Grady could be so

client privilege and thereby prejudiced him in the eyes of the jury. Adamson's allegations of prejudicial error stem from the following questions asked by the prosecutor of Stephen Scott, an attorney who spoke with Adamson the night of the bombing:

"Q. Did you see Mr. Adamson that evening?

"A. No.

"Q. Any reason why you didn't, Mr. Scott?

"A. Why I didn't see him?

"Q. Yes. Weren't you going to represent him?

"A. I didn't know at that time.

"Q. Oh, then why was it that you were being contacted?

"A. For the possibility of representing him.

"Q. I see. But you did not know in your mind as to whether you would or not.

"A. No, I couldn't have at that time. I didn't know Adamson. I had never met him. I didn't know what the possible charges were.

"No, I couldn't at that point in time have made a definite decision.

"Q. Did you at that time plan to talk to Mr. Adamson eventually?

"A. Yes.

"Q. When did you plan to talk to him?

A motion for mistrial was made on the grounds that the prosecutor's questions were designed to probe into areas that were not of legitimate inquiry and were asked for the purpose of forcing defendant to invoke the attorney-client privilege.

At the outset we note that the decision to grant a mistrial is left to the sound discretion of the trial court. In the absence of any showing of abuse of discretion the ruling of the trial court will not be reversed on appeal. State v. Trotter, supra. As noted previously, a mistrial should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted. Watkins & Faber v. Whiteley, supra. In the instant case the questions leading up to defendant's objections were preliminary in nature and concerned only the circumstances under which Scott spoke with Adamson. Preliminary matters such as the fact of consultation, as well as the dates, places, and means of consultation, are usually outside the coverage of the privilege. State v. Alexander, 108 Ariz. 556, 503 P.2d 777 (1972); Udall & Livermore, Law of Evidence § 74, at 141 (2d ed 1982). The prosecutor's question, "Did you talk to Mr. Adamson about representation?" was a legitimate question designed to establish whether or not an attorney-client relationship actually existed. The next question, "Did you have any conversation with Mr. Adamson concerning the bombing?" went to the substance of Scott's telephone conversation with the defendant and therefore was within the protection of the attorney-client privilege. 4/

4/ For purposes of this discussion we will assume that an attorney-client relationship did in fact exist under A.R.S. § 13-4062(2).

is left to the sound discretion of the trial court. In the absence of any showing of abuse of discretion, the ruling of the trial court will not be reversed on appeal. State v. Trotter, supra. We do not believe the trial judge abused his discretion in denying defendant's motion for mistrial. Judge Birdsall questioned the jury about the incident asking if it would in any way influence or affect their deliberations or verdict. All of the jurors answered that it would not. Furthermore, prior to beginning deliberations the jury was instructed that they were not to consider anything heard outside the courtroom concerning the case. (Instruction No. 3) The trial judge was in the best position to determine the effect that the statement had on the jury. He was familiar with all of the evidence before the jury and could therefore conclude that in light of this evidence defendant's allegation of error was not adequate grounds for a mistrial. We find no error.

Additional Instruction

Appellant maintains that the trial court erred by giving the jury a supplementary instruction in response to a note from the jury. After retiring to deliberate the jury sent a note to the judge which read: "There is a question on Instruction No. 13. Were the instructions to the jury written especially for this case, or are they written as general guidelines for the jury to follow? Please clarify Instruction No. 13." Instruction No. 13[5/] dealt with the

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5/ Instruction No. 13 read as follows:

"The defendant has produced evidence that he was not present at the time and place the alleged crime was committed. If you have reasonable doubt whether the defendant was present at the time and place the alleged crime was committed, you must find the defendant not guilty."

that the crime of murder in the first degree has been committed as that crime is defined in instruction No. 8, it is not necessary that you find that the defendant was present at the time of the actual killing, if you find beyond a reasonable doubt that the defendant knowingly and with criminal intent and with the specific intent to kill aided and abetted the crime of murder. In order to find that the defendant aided and abetted you would have to find that he was a person who did aid and abet as those terms are defined in instruction #10 and if you have a reasonable doubt that he did so aid and abet you must find the defendant not guilty.

"You must consider this additional instruction together with all of the other instructions which have been given to you."

Ariz. R. Crim. P. 22.3[7/] expressly allows the trial court to

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7/ Rule 22.3 reads as follows:

"After the jurors have retired to consider their verdict, if they desire to have any testimony repeated, or if they or any party request additional instructions, the court may recall them to the courtroom and order the testimony read or give appropriate additional instructions. The court may also order other testimony read or

failed to disclose material required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that juror misconduct occurred during voir dire. The state responded by showing that each of the allegedly undisclosed items actually were either disclosed, contained material found in earlier reports that were disclosed, or were compiled after the jury had convicted Adamson. The substance of Adamson's claim of jury misconduct is that one of the jurors may have had information that was not disclosed on voir dire regarding the charges against the defendant. No specific facts were given in support of this allegation.

In State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915 (1977), we interpreted the portion of Ariz. R. Crim. P. 32.6[8/] concerning summary disposition of Rule

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8/ The relevant portion of Rule 32.6 reads as follows:

"c. Summary Disposition. The court shall review the petition within 10 days after the petitioner's reply was due. If, upon reviewing the petition, response, reply, files and records, and disregarding defects of form, it determines that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, it may order the petition dismissed, or grant leave to

The trial judge was in a much better position than we are to determine the weight to be given the defendant's claims in his petition and whether or not the allegations taken as true would change the verdict. In light of the trial court's findings, and the well-recognized discretion which rests with the trial court, we hold that the trial court did not abuse its discretion in denying defendant's petition for post-conviction relief.

Ex Post Facto

Defendant argues that being sentenced pursuant to A.R.S. § 13-703 (effective May 1, 1979), rather than A.R.S. § 13-453 which was in effect at the time the offense was committed, violated the ex post facto clause of the United States Constitution. As discussed in Knapp v. Cardwell, 667 F.2d 1253 (9th Cir.), cert. denied, 103 S.Ct. 473 (1982), the change in Arizona's death penalty statute after State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979) requiring the trial court to consider all mitigating circumstances was both procedural and ameliorative. See also State v. Gretzler, ___Ariz. ___, ___P.2d ___, No. 3750-2 (filed January 6, 1983). Likewise, the renumbering of the statute after the changes were made by the Arizona Legislature did not affect any substantive rights granted by the statute. Therefore, there is no ex post facto violation.

Sentencing

Although the defense did not contest the sentence of death on appeal, this Court reviews the record of each case to independently determine if the trial court correctly applied aggravating and mitigating circumstances. State v. Gretzler, supra; State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, ___U.S. ___, 102 S.Ct. 1492 (1982). The trial court found two statutory aggravating

intend that the victim suffer or reasonably foresee that there is a substantial likelihood that the victim will suffer as a consequence of the defendant's acts.

The victim clearly suffered in the instant case. Witnesses who were inside buildings hundreds of feet from the explosion testified that they heard Bolles screaming for help. Bolles had particles from the bomb imbedded in his body. One leg was shattered from the upper hip to his ankle and had the appearance of hamburger. The other leg and one arm were also severely mutilated. The force of the explosion sent a piece of flesh the size of a softball across the parking lot. The means used to kill Bolles made it reasonably foreseeable to Adamson that if Bolles did not die instantaneously there was a substantial likelihood that he would suffer a great deal from his injuries. We therefore find that the murder was accomplished in an especially cruel manner and that the trial court properly found the aggravating circumstances under subsection (F)(6) of the statute.

In mitigation the appellant presented witnesses who testified that Adamson has cooperated with the United States government and the State of Arizona in criminal investigations. Adamson also stated that he was willing to continue this cooperation. He also asked the trial court to consider in mitigation the length of the legal proceedings in this case since its inception. While we have considered this evidence in mitigation, we feel that it is not sufficiently substantial to outweigh the aggravating circumstances and call for leniency. The death sentence is appropriate

The judgment of conviction of first degree murder and the sentence of death are affirmed.

FRANK X. GORDON, JR.
Vice Chief Justice

CONCURRING:

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

HOLOHAN, Chief Justice

I concur in the result.

WILLIAM A. HOLOHAN
Chief Justice

completely ignores the serious constitutional problems which result from the interface of hearsay exceptions and the sixth amendment to the Constitution of the United States. The right of an accused to confront and cross-examine an adverse witness is guaranteed by the sixth amendment to the United States Constitution and applied to the States by the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). This right is also protected by art. 2, § 24 of the Arizona Constitution. State v. Pereda, 111 Ariz. 344, 345, 529 P.2d 695, 696 (1974). Admittedly, the right has never been considered absolute. Mattox v. United States, 156 U.S. 237, 243, 15 S.Ct. 337, 339-40, 39 L.Ed. 409 (1895). Extra-judicial statements may be admitted in evidence without violating the right of confrontation when the declarant is unavailable and the statements bear adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 65-66. 100 S.Ct. 2531, 2538-39, 65 L.Ed.2d 597 (1980). This reliability may be inferred where the evidence falls within a "firmly

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[1] The hearsay rule is merely an additional safeguard applied to testimonial evidence otherwise admissible. The admission of hearsay statements under an exception to the rule "therefore presupposes that the assertor possessed the qualifications of a witness in regard to knowledge and the like." 5 J. Wigmore, Evidence in Trials at Common Law § 1424, at 255 (J. Chadbourn rev. 1974). Arizona Rule of Evidence 602 provides that a witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

The rule is of broad application and applies specifically to dying declarations:

> Even if the requisite consciousness of death is established, other conditions of admissibility must be met. Rule 804(b)(2) . . . contains no specific provision requiring the declarant to have personal knowledge of the facts contained in his declaration. However, the notes to Rule 804(b)(2) indicate that "continuation of a requirement of first-hand knowledge is assured by Rule 602." This is in accord with previous federal law. In Shepard v. United States [290 U.S. 96, 101,
>
> (Footnote continued)

inaccurate because as a result of failing to consider the true issue, the majority applies an incorrect standard in determining whether the error was harmless.

While "overwhelming evidence" of guilt goes a long way in establishing the harmless nature of a trial error, the unfairly prejudicial nature of the error in this case cannot be ignored by emphasizing only the properly admitted evidence. The testimony which was erroneously admitted was of a type most likely to prejudice the defendant -- it included the victim's identification of his killer and highly inflammatory references to the Mafia's involvement in the bombing. The tainted evidence was the only direct evidence of the killer's identity and motive. While the judicial process necessarily requires some degree of soothsaying and crystal-ball gazing, I submit that we carry things too far when we conclude beyond a reasonable doubt that a jury, which spent a day and a half deliberating, would have reached the same conclusion in the absence of the most compelling evidence in its possession.

What the majority really concludes is that if they were jurors, they would have found the defendant guilty even without the erroneously admitted evidence. I agree that there was substantial evidence pointing to defendant's guilt and warranting a finding of guilt beyond a reasonable doubt. Nevertheless, I was not a juror and neither were my colleagues. It is irrelevant to speculate on what we would have done if we had been jurors. The defendant was entitled to a trial by a jury uninfluenced by

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2 Inexplicably, the majority neither mentions the constitutional error nor considers its effect, even though only a few weeks ago the constitutional ramifications of a similar error were recognized and analyzed. See State v. Jeffers, ____ Ariz. ____, ____ P.2d ____ (1983) No. 4253, slip. op. at 20, (filed January 24, 1983).

that some constitutional error could be considered "harmless error." The Court explained:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
>
> In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.
>
> . . . We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id., at 86-87, 84 S.Ct. at 230.

Id. at 22-23, 87 S.Ct. at 827 (emphasis supplied). Thus, the Chapman decision placed the burden on "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S.Ct. at 828.

The Chapman "contribution to the verdict" test was applied by the Court in a subsequent decision, Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In Harrington, the Court held that evidence admitted in violation of the confrontation clause was harmless error because it was merely cumulative of other properly admitted evidence on the same issues and the defendant's guilt was otherwise established by "overwhelming evidence."

At first glance, the Harrington decision appears to qualify the "contribution" test developed in Chapman by adopting an "overwhelming

bench without regard to the probable impact of the tainted evidence on the jury is put in even greater doubt by the Supreme Court's recent decision in Connecticut v. Johnson , 51 U.S.L.W. 4175 (U.S. Feb. 23, 1983) (No. 81-927).

In Johnson, the Supreme Court affirmed the decision of the Connecticut Supreme Court reversing a defendant's conviction on the ground that the trial court had given the jury a conclusive presumption instruction on the question of intent in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). In affirming the state supreme court's holding that this error was not harmless, the Court stated:

> If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made. . . . See County Court of Ulster County v. Allen, 422 U.S. 140, 160 (1979) ("[It is] irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support a conviction").

Johnson, 51 U.S.L.W. at 4178.

The decision in Johnson is a plurality decision in which but four Justices joined; a fifth, Justice Stevens, concluded that no federal question was raised by the Connecticut court's refusal to hold the error harmless and concurred in the opinion for the purpose of allowing disposition of the case. Four Justices dissented, but none of them did so on the ground that Harrington overruled Chapman and provided an overwhelming evidence test as a substitute for a contributing to the verdict test. The dissent discusses the proper test with concern for

see also State v. Ray, 123 Ariz. 171, 598 P.2d 990 (1979). In fact, this very week the court, without discussion, recognized the contribution to the verdict test for harmless error in State v. Martin, ___ Ariz. ___, ___ P.2d ___ (1983)(No. 5713, slip. op. at 6, (filed April 11, 1983).

Under the contribution test for harmless error set forth in Thomas, supra, the error in the case at bench would require reversal. The erroneously admitted evidence was of a type most likely to influence the jury and thus contribute to the verdict. Yet, one minute of cross-examination of Bolles would have revealed that he did not know the killer or motive from first hand knowledge, but only from deduction. Without this bit of information, we cannot exclude the reasonable possibility that the jury was influenced by testimony prohibited by the constitution and that the error therefore contributed to the verdict.

There is little to be gained and much to be lost by use of an overwhelming weight of the evidence test. To be gained is the added speed and efficiency resulting from allowing appellate court judges to weigh evidence and convict by deciding "beyond a reasonable doubt" that the jury would have convicted. The constitution, however, was intended to prevent the sacrifice of principle in the interests of expediency. In any event, there is little need for it; if the evidence is so overwhelming this court can tell beyond a reasonable doubt that the jury would have convicted the defendant without the tainted evidence, then surely this court can tell beyond a reasonable doubt that the next jury would reach the same result. Why then do we need to violate the constitution? Would it not be better to observe constitutional precepts rather than to discard them in our haste to the gallows? It may not make much difference to this defendant, but in the long run faithful adherence to constitutional concepts and procedures will

In my view, therefore, the court has failed to recognize, discuss or analyze the serious constitutional error which was committed in this case. As a result, it has applied a test for harmless error which, if it is to be used at all, should be used only where the error was of a non-constitutional, non-fundamental nature. Therefore, I dissent and would reverse and remand the case for a new trial.

STANLEY G. FELDMAN, Justice

Adamson Jury Voted Twice Before Verdict

11-7-80
Phx Gazette

GREEN VALLEY (AP) — The foreman of the jury that convicted John Harvey Adamson in newspaper reporter Don Bolles' bomb killing says it took three votes to reach the verdict.

James Johnson, a miner living in this retirement community, said in a story by Lisa Schnebly of the *Green Valley News* that not guilty votes came on the first two ballots probably from jurors who felt Adamson had been framed in the case.

The story, published today, was the first public comment from any juror in the case since the verdict was returned Oct. 17.

At the time of the verdict, Superior Court Judge Ben C. Birdsall announced to the news media that jurors were unanimous in saying they did not want to talk to reporters afterward.

ADAMSON was convicted of first degree murder and faces sentencing Nov. 14. The prosecutor has said he will present evidence to show the death penalty is justified.

Johnson said on the first ballot there were four votes for acquittal. On the second, there was one such vote, he said.

"I do not believe that one of them held out based on fear," Johnson said. "But considering the fact that many people were involved, there

Turn to • ADAMSON, Page A-4

ADAMSON JURY FOREMAN

(Concluded from Page A-1)

was reason to believe Adamson had been set up."

One woman juror was convinced of that, Johnson said.

"Nothing would have pleased me more than to prove her right," he said. "But we couldn't. And I felt we owed Don Bolles justice. We had an obligation to this man who could no longer speak for himself."

JOHNSON said that as foreman, he decided the jury was going to be sure of its decision by examining all the evidence carefully.

"We had voted two times prior to reaching a decision," he said. "I called for a vote just before lunch Friday. I held up the note Bolles had left in his typewriter before meeting Adamson and his picture for the jury to see.

"I reminded the jury that Bolles was asked if Adamson had ever threatened him. He was near death. If he had wanted to finger Adamson, he would have said yes. He still said no. The difference between the two men is that the murdered one told the truth."

Bolles' typewritten note mentioning Adamson's name and Bolles' naming of Adamson to witnesses at the bombing scene and to police later as he lay dying were key elements in the prosecution's case against Adamson.

JOHNSON said when the third and deciding ballot was taken and the unanimous result announced, built-up tension in the jury room broke.

"The women wept and consoled one another," he said, "and one of the men left the room so we wouldn't see him cry. We asked for time to compose ourselves before we entered the courtroom."

Later, Johnson said, the judge told jurors that he thought they had made a good decision. In addition, the jurors were told for the first time that Adamson once had pleaded guilty in Bolles' killing.

That was in a plea bargain the state claimed Adamson later breached, leading to the refiling of the first-degree murder charge against him.

Johnson said he plans to be in court for Adamson's sentencing, to see "the course of justice completed."

He said he thinks Adamson deserves a harsh penalty, even death, for what he did.

"I have no empathy for a man who can develop such shallow values that he will sacrifice another man's life for money," he said.

Of the jury's 11 days of being sequestered, Johnson said: "Throughout the trial, the jurors showed nothing but respect for one another. We took all our meals together, spent more than eight hours a day in close quarters. But no one ever infringed on anyone else's privacy."

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

FILED

FEB 2 1981

JAMES N. CORBETT, Clerk

THE STATE OF ARIZONA,

Plaintiff,

v.

JOHN HARVEY ADAMSON,

Defendant.

Maricopa County

Case No. CR-93385

Tucson, Arizona

November 14, 1980

Friday, 9:15 a.m.

BEFORE: The Hon. Ben C. Birdsall, Judge
Pima County Superior Court, Division IX

APPEARANCES:

William J. Schafer, III, Esq., Deputy Attorney General, State of Arizona, appearing in behalf of the State

William H. Feldhacker, Esq., and Gregory H. Martin, Esq., Attorneys-at-Law, appearing in behalf of the Defendant

MOTIONS

AGGRAVATION AND MITIGATION HEARING

SENTENCING

Bruce E. Johnson
Official Court Reporter

SUPERIOR COURT, PIMA COUNTY

Tucson, Arizona

November 14, 1980

Friday, 9:15 a.m.

MORNING SESSION

THE COURT: Good morning. This is Maricopa County Case No. CR-93385, State of Arizona vs. John Harvey Adamson.

The first motion which is set is the Defendant's Motion for a New Trial. You had something else that you wanted to put on the record. I think that should wait until I hear the Motion for a New Trial.

Mr. Martin.

MR. MARTIN: Your Honor, may Mr. Schafer and I approach the Bench for just a second.

THE COURT: Certainly.

(Whereupon, a bench conference was had out of the hearing of the body of the courtroom, to-wit:)

MR. MARTIN: I neglected to tell you, Judge, in connection with this motion I have subpoenaed Mr. Johnson, who was the foreman of the jury, and I propose to call him as a witness and simply have him testify concerning what occurred in the jury room during deliberations, particularly with respect to the -- the notes and the statements that were allegedly made by

Bolles at the scene.

It is my understanding from reading the newspaper article that piece of the evidence played a large part, I guess, in persuading 12 people to agree on the verdict of guilty.

One reason for doing that is to get in the record that those pieces of evidence were considered by them, by permitting them to view the exhibits and listen to that evidence, it played a large part in returning a verdict of guilty and should a court later on decide you were in error in doing so, it would be in the record that it was not harmless error.

I think this was considered to a great extent in the verdict. The only reason I am going into it is to get it in the record so that somebody later on understands that it wasn't harmless error. I was going to bring that article if you don't want me to call Johnson, I was going to ask that the article be marked. I have the article with me. If you would rather do it that way, I can do it, but I do think that something should be in the record regarding -- regarding that.

THE COURT: Well, I think I should let the State be heard on it first. I have my own ideas.

MR. SCHAFER: Well, I object to anything he intends to do in that regard. I don't know if he is

really saying at this point, if he is making a motion, but it's a motion to the Court to allow Mr. Johnson to testify or to allow in any manner for that to come before the Court and be made a part of the record, and I object to it. I don't think it's proper.

I think the latest case from this Court of Appeals, Compton (phonetic) and Harden (phonetic) talks about juror affidavits and it doesn't concern this specific point, but it reiterates that you can't go into what the jury considered one way or the other. It makes no difference if an article has appeared in the newspaper by Mr. Johnson or anybody. In a court of law that should not be gone into, that should remain inviolate.

I object to anything along that line.

THE COURT: Mr. Martin.

MR. MARTIN: I hope I made myself clear, the reason I'm doing that is that later the Court couldn't tell me it's harmless error you let this in because we know now it wasn't. We know it was considered. For a long time apparently this was something they -- that's the only reason I'm doing it.

I guess it's in the form of a motion. I want to call Mr. Johnson. I should, of course, bring it up, and I thought I should bring it up now.

THE COURT: I would sustain the State's

objections. I would permit you to have the newspaper article marked as an offer of proof of the newspaper article, but to call any member of the jury and ask questions of that kind is permitting examination into the deliberations and the mental processes and thinking of the jury and it's absolutely not permissible.

MR. MARTIN: Okay. I'll abide by the ruling.

I don't have the article here. Maybe at another point of time, I'm talking about the first of next week, I can send the article down and ask that it be marked and simply made a part of the record.

THE COURT: Yes, sir. I understand. That's over the State's objection.

MR. SCHAFER: Yes.

THE COURT: I haven't seen the article. I have been told about it. Yes, you may do that.

MR. MARTIN: Well, then I won't call him.

THE COURT: All right.

MR. SCHAFER: Is he here?

MR. MARTIN: Yes. Yes, I served him.

THE COURT: He can stay.

(Open court.)

THE COURT: Before you argue your Motion for a New Trial, and pertaining to the Motion for a New Trial, I want to make this record.

ORIGINAL

Office - Supreme Court, U.S.
FILED
AUG 30 1983
ALEXANDER

NO. 83-5227

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN HARVEY ADAMSON,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did not the majority of the Arizona Supreme Court apply the correct test for harmless error by considering the record as a whole?

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STATEMENT OF THE CASE

In June 1976 Adamson was charged with the car-bombing murder of reporter Don Bolles. He pled guilty to second-degree murder in January, 1977, and was sentenced in November, 1978. Under conditions of the plea agreement, the state called upon him to testify at the planned retrial of James Robison and Max Dunlap after the Arizona Supreme Court reversed their convictions in March, 1980. Steadfastly maintaining that he had no obligation to testify at a retrial, Adamson produced a list of "demands" that he considered conditions precedent to his testimony. Refusing to accede to those demands, the Attorney General sought, by way of special action, to have the Arizona Supreme Court determine whether appellant had breached his obligations under the plea agreement. The Arizona Supreme Court resolved that issue in favor of the state and permitted reinstitution of the original charge of open murder. State v. Adamson, 125 Ariz. 579, 611 P.2d 932 (1980). Subsequently Adamson sought, and was denied, relief from the federal district court in Phoenix and the Ninth Circuit. This Court denied a petition for certiorari in 1982. Adamson proceeded to trial in October, 1980. The Arizona Supreme Court affirmed the conviction and sentence. State v. Adamson, ____Ariz.____, 665 P.2d 972 (1983). That court denied rehearing June 22, 1983. A summary of the evidence adduced at trial follows.

Richard Ryan, former court reporter, testified that in May, 1976, at the Ivanhoe Lounge on Central, Adamson asked him whether he knew Don Bolles. Appellant asked him to call Bolles and say that he (Adamson) wanted to talk to him about the Funks and Sam Steiger. The last week in May, again at the Ivanhoe, Adamson asked Ryan whether he had called Bolles. Ryan did contact Bolles and relayed Adamson's message and name. Afterward, Ryan called Adamson and told him he had contacted

Bolles. Ryan also stated that he had frequently seen Adamson with attorney Neal Roberts at the Ivanhoe. (R.T. of Oct. 7, 1980, at 37-59.)

Bernie Wynn, political editor for the Arizona Republic, shared an office with Bolles at the state capitol during May through June 1976. The morning of June 2, Wynn found a note in his typewriter. The note informed him that Bolles had gone to meet the "guy with the info on Steiger" at the Clarendon House, and bore Bolles' typed signature. Later that day, Wynn discovered a handwritten note in Bolles' desk that said "John Adamson, lobby at 11:15, Clarendon House, Fourth and Clarendon." Wynn identified the writing as Bolles'. Since Bolles had discussed meeting a man, Wynn had some idea about the matters to which the notes alluded. (R.T. of Oct. 7, 1980, at 60-67.)

Judy Holliday, desk clerk at the Clarendon House June 2, 1976, recalled seeing Don Bolles in the lobby that morning. A caller asked if there was a Don Bolles in the lobby, and Bolles spoke with that person on the desk phone. Shortly after Bolles left the lobby, Ms. Holliday heard the explosion in the parking lot. (R.T. of Oct. 7, 1980, at 69-80.)

Leslie Arnold was just pulling into the Clarendon House parking lot when the bomb attached to the floorbard beneath Bolles' vehicle seat detonated. She put a rag under his head. He told her twice, "Adamson did it." He also told her that he was investigating a Mafia organization called Emprise, and asked her to remember it because he did not think he was going to make it. In addition, Bolles stated that he had an appointment with John Adamson, but Adamson had not appeared. (R.T. of Oct. 7, 1980, at 84-91.)

Lelon Reed, a refrigerator repairman who was working nearby, applied makeshift tourniquets to both Bolles' legs.

Describing the pool of blood leading from Bolles' body to the front of the car, Reed stated that Bolles' left leg, from the buttock to the ankle, looked like hamburger. Reed heard Bolles mention Adamson's name three times. (R.T. of Oct. 7, 1980, at 92-103.)

Attorney Max Klass was in an office building adjacent to the parking lot when the explosion occurred. As he entered the southeast corner of the lot, he found a mound of flesh the size of a softball. Klass, who knew Bolles, testified that he did not recognize him as he lay in a huge pool of blood. Bolles told Klass, "Adamson sent (or set) me." (R.T. of Oct. 7, 1980, at 104-14.)

Fire Captain Jerry VanSant stated that part of the car's floorboard had blown through the muscle portion of Bolles' lower right leg, shredding it. Bolles said that the Mafia had made good their threats, and urged rescuers to hurry because he believed that he was dying. (R.T. of Oct. 7, 1980, at 115-26.)

The afternoon of June 3, Phoenix Police Detective Jon Sellers communicated with Don Bolles at St. Joseph's Hospital. Sellers asked questions and, by means of finger and head signals, Bolles gave affirmative or negative answers. Bolles indicated that he had gone to the Clarendon House the day before to meet Adamson and received a call from him while there. The purpose of the meeting was to gather information about Sam Steiger. Bolles had met Adamson 4 days earlier on the east side of Phoenix. Bolles identified a 1975 driver's license photograph of Adamson as the man he had met 4 days earlier, and as the person he had intended to meet June 2. In addition, Bolles indicated that he suspected Emprise Corporation was behind the bombing. Sellers testified that Emprise and the Funks owned many dog-racing tracks. (R.T. of Oct. 10, 1980, at 72-90.)

Various criminalists and members of the Phoenix Police bomb squad testified about the origin, composition, and functioning of the radio-controlled bomb that killed Bolles. Th bomb consisted of an ammonium-nitrate type of dynamite secured to the underside of Bolles' car by two (or more) horseshoe magnets with a red krinkle finish. Investgators traced the triggering device from Buena Park to San Diego, California. (R.T. of Oct. 8, 1980, at 4-128.)

Gail Owens testified that she accompanied Adamson to San Diego in April 1976. They went to West Coast Hobbies, where Adamson purchased something that fit into a shoe box. A few weeks after their return to Phoenix, Adamson asked her whether she knew Bolles, and twice asked her to go to the Brookshire to see whether Bolles visited there. He told her that if everything worked out, "I'll have two more and make a lot of money." He called her the afternoon of June 2, 1976, and told her that something had happened and he would not see her for a while. (R.T. of Oct. 8, 1980, at 161-78; Oct. 9, 1980, at 3-18.)

Jay Patrick Allen, who worked at West Coast Hobbies in San Diego in April 1976, testified that he sold a Cirrus brand radio-control device to a man accompanied by a woman, and placed it in a shoe box. (R.T. of Oct. 9, 1980, at 27-32.)

Robbert Lettiere testified that in May 1976 Adamson asked him to take a ride with him to the parking lot of the Arizona Republic. Adamson asked the guard there whether Don so-and-so's car was on the lot. He later told Lettiere that he was going to blow up a guy because he was stepping on people's toes and giving them hard times. Adamson told Lettiere that he would get about $10,000 for "this one," and asked Lettiere whether he would be interested in future work for a 10% cut of what he would make. They visited a Datsun dealership (Bolles'

car was a Datsun), where Adamson closely examined several cars -- including the undercarriage. The afternoon of June 2, 1976, Lettiere contacted Adamson at Neal Roberts' house to tell him that his name was being broadcast as a suspect in the bombing. The next night Adamson and his wife visited Lettiere. Adamson said, "You didn't believe I could do something like that, and you got to believe it now." Commenting that he would have to get a Datsun "because it sure as hell took a jolt," Adamson added that he could be in the same boat as Bolles because he botched the job. Lettiere accompanied Adamson and his wife to Neal Roberts' home the morning of June 4. Lettiere had also met James Robison at Adamson's apartment. Around New Year's Eve, 1975, Adamson took Lettiere to the storage area for his apartment, where Lettiere saw dynamite. (R.T. of Oct. 9, 1980, at 56-78.)

John Parsons testified that Adamson and James Robison were at Parsons' home in late 1975 or early 1976. When appellant saw Parsons' homemade bomb shelter, he said, "This would be a perfect place to store dynamite, and it would save a lot of time." (R.T. of Oct. 10, 1980, at 26-31.)

Attorney Tom C. Foster, who had an office in the First Federal Building adjacent to the Ivanhoe Lounge, stated that Adamson had asked him whether someone could leave a package for him at Foster's office. Patti Lloyd, Foster's secretary, testified that, after the bombing, Adamson appeared on three occasions at Foster's office inquiring whether someone had left a package for him. On one occasion, he and Max Dunlap conversed in one of the suites. (R.T. of Oct. 10, 1980, at 34-53.)

John Stubbs, a teller at the First National Bank at Washington and Central, testified that in June 1976, Max Dunlap came in and asked him to change 35 $100 bills into smaller

ones. Stubbs gave him 100 $20's and 100 $10's. (R.T. of Oct. 10, 1980, at 64.)

Sherman and Juanita Watters, managers of the Grandview Apartments, testified that on June 12, 1976, Adamson paid 2 month's rent with $420 in new $20 bills. Juanita Watters had seen James Robison at the apartments in April, May, and June; she also identified Dunlap's photograph and stated that she had seen him go into Adamson's apartment. (R.T. of Oct. 13, 1980, at 2-11.)

Eileen Katz, who was Neal Roberts' secretary during May through June, 1976, stated that she had seen Adamson several times at Roberts' office-home complex. She had also seen Max Dunlap, one of Roberts' clients, and James Robison at Roberts' office. Specifically, she recalled a conversation June 1, 1976, in Roberts' office between Roberts, Adamson, and a third man. She remembered Roberts saying, "Can you keep control of this in a definite radius?" The morning of June 2, 1976, she saw Dunlap in Roberts' office about 8:30, and Adamson about 10:00. Adamson told Ms. Katz to inform Roberts that "God" was there. Adamson, Roberts, and Dunlap talked, but Adamson left before Roberts left at 11:30 a.m. At a social occasion June 6, 1976, Katz heard Roberts say that he hoped that "poor bastard" (Bolles) would die. (R.T. of Oct. 13, 1980, at 12-45.)

Detective Marcus Aurelius testified that he was present in Adamson's apartment when police searched it, pursuant to a warrant, 2 days after the bombing. Police located five items simultaneously in the linen closet: an EverReady 6-volt battery, one spool each of insulated and noninsulated wire, and two red magnets (the same color as those used to attach the bomb to Bolles' car). Subsequently, police found a partially used role of black plastic electric tape, a 9-volt EverReady transistor battery, "The Anarchists's Cookbook," and two

homemade firecrackers with dynamite fuse in them. (R.T. of Oct. 8, 1980, at 147-53.)

Adamson did not, as he indicates in his petition, call "a number of witnesses to establish his alibi defense." (Petition, at 4.) The only witness he had upon that issue was Thomas O'Grady, who could not say with certainty what time Adamson gave him a ride the day of the bombing. The best O'Grady could do was estimate that Adamson gave him a ride between 11:00 and 12:00 noon. O'Grady contacted Adamson at the Ivanhoe Lounge (where Adamson hung out), which was less than a mile from the parking lot of the Clarendon House, where the bombing occurred. Thus, all O'Grady established was that he saw Adamson that day, but he could not pin down the time. (R.T. of Oct. 13, 1980, at 104-11.) Although it is true that one guard at the Arizona Republic parking lot said that an individual who drove onto that lot in May 1976 and asked for the location of Bolles' car was not Adamson, on cross-examination that guard admitted that he had no idea how tall the man was and did not remember whether he was wearing sunglasses. In addition, Robert Lettiere testified that he was with Adamson when Adamson drove to the Arizona Republic parking lot. This particular guard, however, stated that he saw only one person in the car, the driver. Moreover, that guard worked one shift and admitted that there were two other shifts of guards. Thus, even if one assumes that some individual other than Adamson asked that particular guard about the location of Bolles' car, that does not prove that the same guard was on duty when Lettiere accompanied Adamson to the parking lot. Lettiere knew only that he had accompanied Adamson on this one occasion; he had no way of knowing how many other times Adamson may have visited the parking lot. Finally, Adamson's statement in his petition that the general description given by the guard

at trial fitted Lettiere has no basis in the record because there is no description of Lettiere in the record. (R.T. of Oct. 13, 1980, at 93-99.)

When petitioner speaks about the newspaper article that he appends as an exhibit to the petition, the Court will note that nowhere in that article is any juror quoted as saying that he or she found "crucial" Bolles' statements on the parking lot that Adamson "did it" or that a "Mafia called Emprise" was involved. That was an editorial comment (obviously an inference drawn by the writer of the article) and not a quotation from any juror. Moreover, petitioner did not offer an affidavit from any juror stating that he or she found absolutely crucial the particular statements he now claims were so important.

REASONS FOR DENYING THE WRIT

The best reason for not granting certiorari in this case is that the majority of the Arizona Supreme Court applied the correct test for determining harmless error. Justice Feldman, in dissent, relies heavily on the "might have contributed to the verdict" language of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In addition, he found support for his dissent in the recent decision of Connecticut v. Johnson, ____Ariz.____, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). Those decisions, however, must be read in conjunction with Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), and the most recent pronouncement of this Court about the proper standard, United States v. Hasting, ___ U.S.____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Both of those cases unequivocally stand for the proposition that if the reviewing court can say beyond a reasonable doubt that the jury would have convicted without the inadmissible evidence, the conviction may stand:

> The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

United States v. Hasting, 103 S.Ct. at 1981, 76 L.Ed.2d at 107. It is perfectly clear, that this Court is saying that the appellate court should examine the entire record: "On the whole record, we are satisfied beyond a reasonable doubt that the error relied upon was harmless." (Id. at 1982; 76 L.Ed.2d at 108.) It is important to bear in mind that Justice Feldman did not have the benefit of Hasting when he authored his dissenting opinion. The test enuciated in Harrington and Hasting is precisely the one applied by the majority in the instant case. 665 P.2d at 978.

If the Arizona Supreme Court applied the correct test, respondent respectfully asserts that the inquiry should end there. By implication, petitioner would seek the writ even if the Arizona Supreme Court utilized the proper standard because he disagrees that the evidence of guilt was overwhelming. If this Court should choose to reach that issue, respondent submits that the evidence was overwhelming. In focusing narrowly upon some statements made by Bolles as he lay in the parking lot -- his legs reduced to the consistency of raw hamburger -- both Justice Feldman and petitioner lose sight, and a sense of proportion, about all the other evidence presented by the state. Justice Feldman seizes upon the "identification" of Adamson as the murderer and the alleged involvement of the Mafia as critical under the test of matters that may have contributed to the verdict. He may be right under that test. However, that is not the test, and the state

presented an enormous amount of evidence, completely untainted by those few statements, that, even Justice Feldman admits, would sustain guilt beyond a reasonable doubt. 665 P.2d at 991. For instance, there was no refutation of the testimony of Richard Ryan that Adamson asked him to contact Don Bolles to tell Bolles that Adamson had information about the Funks and Sam Steiger (the Funks were involved in greyhound racing and Steiger is a well-known local political figure). At the hospital Bolles told Detective Sellers that the purpose of the meeting arranged by Adamson was to gather information about Steiger. Therefore, Justice Feldman's insistence that there was no other motive offered by the prosecution, apart from the reference to the Mafia, is not correct. The fact that Bolles told one witness that "Adamson [set or sent] me" was within Bolles' personal knowledge because he left notes at his office before going to the Clarendon House to meet Adamson, and he was able to communicate to Detective Sellers that he had gone to the hotel the day of the bombing to meet Adamson and received a call from him in the lobby while waiting for him. 665 P.2d at 976-77. The testimony of Robert Lettiere, which defense counsel could not rebut, was extremely damaging in that it contained admissions both before and after the bombing about Adamson's motivations (Bolles was stepping on some people's toes) and the fact that Adamson participated in the bombing. (Id.) The testimony of Gail Owens, who accompanied Adamson to West Coast Hobbies in San Diego a month before the bombing, and that of a clerk of that store to the effect that he sold a man, accompanied by a woman, a radio-controlled device he put into a shoe box, provided additional proof of Adamson's guilt. (Id.) The testimony

of Neil Roberts' secretary that she heard Roberts while meeting with Adamson say, "Can you keep control of this in a definite radius?" was hardly helpful to Adamson. Petitioner concedes that police, only 2 days after the bombing, executed a search warrant and found materials in his apartment very similar to those used in constructing the bomb. On the whole record, which is the test this Court established in Harrington and reaffirmed in Hasting, supra, it can be said beyond a reasonable doubt that the jury would have convicted even without the few statements about matters not within Bolles' personal knowledge.

Petitioner impugns the impartiality of the majority of the Arizona Supreme Court to objectively review his case because they were aware, due to his breaching a previous plea agreement, that he had pled guilty to Bolles' murder. Respondent submits that court would have reached the same conclusion if Adamson had never pled guilty. Petitioner characterizes his plea agreement as later declared "null and void." He does not mention that every court that considered that agreement concluded that he had breached it by refusing to testify at a planned retrial of James Robison and Max Dunlap. This Court denied certiorari in that matter. That the Arizona Supreme Court knew that Adamson had pled guilty in no way diminishes by one whit the overwhelming evidence against him.

Finally, petitioner conjectures that the few statements found inadmissible by the Arizona Supreme Court were the pivotal ones that swayed the original dissenters on the jury to change their votes. That is pure speculation because the jury was considering everything the state had presented and, petitioner must concede, everything else was

admissible. Moreover, the prosecutor mentioned neither the Mafia nor Emprise in his closing argument. This is a case in which the defendant, weeks before the bombing, told people he was going to blow up a particular person for "stepping on some people's toes," then proceeded to do exactly that. After the bombing, he told people that he had done it. If the evidence presented by the state was not overwhelming, it is difficult to imagine what would be.

CONCLUSION

The majority of the Arizona Supreme Court applied the proper test of harmless error, and there is no reason for granting the writ. The evidence, even devoid of those few inadmissible statements, was overwhelming beyond a reasonable doubt.

Respectfully submitted,

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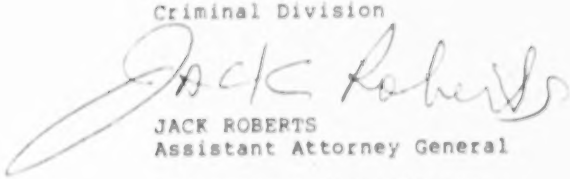

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

JACK ROBERTS, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding one (1) copy of RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

GREGORY H. MARTIN
P.O. Box 5142
Scottsdale, Arizona 85261
Attorney for APPELLANT

this 26th day of August, 1983.

Jack Roberts
JACK ROBERTS

SUBSCRIBED AND SWORN to before me this 26th day of August, 1983.

Barbara J. Ordreno
NOTARY PUBLIC

My Commission Expires:

September 28, 1986

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